Supreme Court, U.S.
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No. 06-143

IN THE

Supreme Court of the United States

WEST HOLLYWOOD COMMUNITY
REDEVELOPMENT COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, ("CAFRA"), codified as amended, 18 U.S.C. § 983, precludes the forfeiture of property belonging to an "innocent owner." Under that provision, a claimant who owns property that was used for illegal purposes may avoid forfeiture if, "upon learning of the conduct giving rise to the forfeiture, [the claimant] did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A)(ii). CAFRA further states that the "ways" in which a claimant may meet that standard "include" showing that the claimant (a) "gave timely notice to an appropriate law enforcement agency of information that led the person to know" of the illegal use, 18 U.S.C. § 983(d)(2)(B)(i)(I); and (b) "in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property," 18 U.S.C. § 983(d)(2)(B)(i)(II). The questions presented are:

1. Whether the Ninth Circuit erred in construing the phrase "an appropriate law enforcement agency" to mean *federal* law enforcement authorities, and as excluding state law enforcement officials with authority to arrest for the violations at issue.

2. Whether the Ninth Circuit erred in construing CAFRA's statutory safe harbor, 18 U.S.C. §§ 983(d)(2)(A)(ii)(I) and (II), as an exhaustive list of the actions through which claimants may prove that they did "all that reasonably could be expected under the circumstances."

3. Whether the Ninth Circuit erred in holding that the question of reasonableness "under the circumstances" was for the court rather than for the jury to decide.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, the West Hollywood Redevelopment Commission, was appellant in the court of appeals and claimant in the district court. Respondent, the United States of America, was appellee in the court of appeals and plaintiff in the district court. The property located at 7494 and 7501 Santa Monica Boulevard, in West Hollywood, California, was defendant in the district court. L.A. Cannabis Resource Center, Inc., Scott Imler, and Wells Fargo Bank, N.A., were claimants in the district court.

In the district court, this case—number CV-02-4176-R(CTX)—was consolidated with two other cases. In case number CV-02-4724-R, the United States of America was plaintiff; Real Property Located at 343 Lockwood Valley Road in Frazier Park, California, was defendant; and Judy M. Osburn and Lynn W. Osburn were claimants. In case number CV-02-4176-R, the United States of America was plaintiff; $55,908.58 in funds seized from Wells Fargo Bank Account Nos. 037-2068957, 636-9732813, 624-6386437, 075-8539936, and 075-8539928, in the name of Los Angeles Cannabis Resource Center was defendant; and L.A. Cannabis Resource Center, Inc., and Scott Imler were claimants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner West Hollywood Community Redevelopment Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. The opinion of the district court (App., *infra*, 4a-21a) and corresponding judgment (App., *infra*, 22a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2006. The court of appeals denied rehearing

(App., *infra*, 25a) on April 27, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(d), are reprinted at App., *infra*, 26a-43a.

STATEMENT

This case involves the federal government's seizure, under the Civil Asset Forfeiture Reform Act, of public money devoted to the redevelopment and rehabilitation of blighted property.

1. In November of 1996, the voters of the State of California passed Proposition 215 ("The Compassionate Use Act of 1996") to authorize the use of marijuana by seriously ill patients on a physician's recommendation. Proposition 215 by its terms creates, for those patients, an exception to California laws that otherwise would prohibit their possession and cultivation of marijuana. Soon after Proposition 215 was passed, a not-for-profit, patient-based organization called the Los Angeles Cannabis Resource Center ("LACRC") began operating in the City of West Hollywood. The LACRC was a cooperative marijuana growing operation that made its marijuana available to qualifying patients in need, consistent with Proposition 215.

In 1999, the LACRC contacted the Deputy Executive Director of the West Hollywood Community Redevelopment Commission about the possibility of purchasing the building where it was operating. Eventually, the LACRC purchased the building at 7494 Santa Monica Boulevard, in an area of the City suffering from blight and lack of economic investment. The LACRC was able to make a down payment of 10% of the purchase price. Wells Fargo Bank loaned the LACRC 65% of the purchase price, secured by a first deed of trust. As part of its redevelopment efforts, the City of West Hollywood loaned the LACRC $300,000

toward the purchase, which was secured by a 25% second deed of trust on the property.

Around the time the LACRC purchased the property, the Ninth Circuit Court of Appeals issued its opinion in *United States* v. *Oakland Cannabis Buyer's Cooperative*, 190 F.3d 1109 (1999). In that decision, the Ninth Circuit held that there is an implied medical necessity defense to the Controlled Substances Act's prohibition on the manufacture and distribution of marijuana. The United States petitioned this Court for a writ of certiorari soon thereafter. In view of the ongoing litigation in *Oakland Cannabis*, the loan agreement between West Hollywood and the LACRC provided that, if the LACRC's use of the property was ultimately declared illegal by final action of this Court, the LACRC must cease using the property for any purpose declared illegal. App., *infra*, 2a, 13a, 20a. The agreement further provided that the LACRC's failure to limit its use of the property to lawful activities would be considered an event of default under the agreement. *Ibid.*

The LACRC did not hide the fact that it cultivated marijuana for medical use by qualifying patient-members. App., *infra*, 12a. The Drug Enforcement Administration ("DEA") had been aware of the LACRC's operations from as early as May of 1997, when it began surveillance of the LACRC's facility. C.A. E.R. 143-144. Indeed, after applying to the DEA for a "license" to manufacture marijuana for medical purposes consistent with California's Compassionate Use Act, the LACRC invited the DEA to inspect its facility, and the DEA did so on or about September 17, 1999, in connection with the LACRC's application. App., *infra*, 8a-9a. During the visit, DEA agents viewed marijuana being grown and, from that time on, the DEA was intimately aware of the details of the LACRC's operation. *Id.* at 9a.

Nevertheless, the LACRC continued to operate without interruption and with the DEA's full knowledge for two

additional years. During that time, the City of West Hollywood repeatedly consulted and cooperated with the Los Angeles Sheriff's Department regarding the LACRC's activities on an ongoing basis. *Id.* at 7a; C.A. E.R. 126-138, 140, 141; see also *id.* at 93-94.

On May 14, 2001, this Court reversed the Ninth Circuit's decision in *United States* v. *Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483 (2001). Among other things, the Court rejected the Ninth Circuit's holding that there was an implied medical necessity exception to the Controlled Substances Act's prohibitions on the manufacture and distribution of marijuana. The Court did not otherwise address the validity and effect of California's Proposition 215 or its relationship to federal law.

2. On October 5, 2001, the DEA executed a search warrant at 7494 Santa Monica Boulevard, seizing marijuana plants and other evidence. On May 24, 2002, the United States filed a Complaint for Forfeiture against the property; it filed an Amended Complaint for Forfeiture on September 25, 2002. The complaint alleged that the DEA had visited the property in response to the LACRC's "application" to the DEA for "a license to manufacture marijuana for medical research." C.A. E.R. 3. During the visit, DEA agents observed that the LACRC was distributing marijuana to its members for medical uses (with the amount for each member "limited to the amount stated in a prescription filed with the LACRC"). *Ibid.* The complaint further alleged that, when the property was searched under a warrant in October of 2001, DEA agents found extensive evidence of similar marijuana distribution activities. *Id.* at 5-6.

Petitioner, the West Hollywood Redevelopment Commission, filed an answer to the complaint together with a claim in the amount of $298,260.94. Among other things, the Redevelopment Commission asserted the "innocent owner defense" provided by the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983(d)(2)(A)(ii).

Under CAFRA, a property owner qualifies as an "innocent owner" and may avoid forfeiture if, "upon learning of the conduct giving rise to the forfeiture, [the claimant] did all that reasonably could be expected under the circumstances to terminate such use of the property." *Ibid.* The statute then sets forth two examples of conduct that constitutes "all that could reasonably be expected under the circumstances." In particular, CAFRA states:

> For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—
>
> (I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and
>
> (II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

18 U.S.C. § 983(d)(2)(B)(i).

The district court granted summary judgment in favor of the government, vesting in the United States all right, title, and interest in the property, and forfeiting the Redevelopment Commission's security interest. App., *infra*, 23a. With respect to the Redevelopment Commission's innocent owner defense, the district court held that the Redevelopment Commission could not show that it "did 'all that reasonably could be expected under the circumstances to terminate' [the illegal] use of the property." *Id.* at 19a. Examining the first statutory example, the district court concluded that, although the Redevelopment Commission and the City were in contact with the Los Angeles County

Sheriff's Office, they nonetheless had not notified "an appropriate law enforcement agency" within the meaning of the statute:

> Given that the DEA was charged with enforcement of federal drug laws and [the Los Angeles Sheriff's Department] was charged with enforcement of state drug laws, giving notice only to [the Los Angeles Sheriff's Department] is not sufficient notice to an "appropriate" law enforcement agency for purposes of enforcement of federal drug laws.

App., *infra*, 20a.

The district court then turned to the "second example given" by the statute. App., *infra*, 20a. To qualify under that example, the district court explained, the claimant must "show that it 'revoked or made a good faith attempt to revoke permission for those engaging in such conduct to [use] the property'" or otherwise cooperated with law enforcement to "prevent the illegal use." *Ibid.* The district court stated that, in this case, the deeds of trust expressly afforded the Redevelopment Commission "power to revoke permission to use the property for illegal purposes." *Ibid.* Because the Redevelopment Commission had not made "any effort to revoke the permission to use the property in an illegal manner," the district court held that the Redevelopment Commission had not done "all that it could reasonably do" under the circumstances and therefore could not qualify as "an innocent owner" within the meaning of 18 U.S.C. § 983(d)(2)(B). *Ibid.*

3. The Redevelopment Commission appealed, and the Ninth Circuit affirmed. App., *infra*, 1a-3a. The Ninth Circuit stated that, in *Oakland Cannabis Buyer's Cooperative*, this Court rejected the Ninth Circuit's conclusion that there is "a medical necessity exception to the Controlled Substances Act," putting the Redevelopment Commission "on notice" that "the Center's activities violate federal law." App., *infra*, 2a. Accordingly, the court of appeals declined

to address whether the Redevelopment Commission had satisfied the requirement to be an innocent owner before this Court issued its decision in *Oakland Cannabis Buyer's Cooperative*. App., *infra* 3a. Instead, the court of appeals held that the Redevelopment Commission's actions following that decision were insufficient to make it an innocent owner.

First, the court of appeals noted that, as many as five months after this Court's decision in *Oakland Cannabis*, the Redevelopment Commission had done "nothing to terminate illegal use of the property." App., *infra*, 2a. As a result, the court of appeals held that the Redevelopment Commission could not fall within 18 U.S.C. § 983(d)(2)(B)(i)(II): "[A]lthough [the Redevelopment Commission] had a contractual right to default the loan and institute foreclosure proceedings in court, it didn't." App., *infra*, 2a. With respect to the example provided by 18 U.S.C. § 983(d)(2)(B)(i)(I), the court of appeals held that the Redevelopment Commission could not qualify because it failed to "contact federal law enforcement authorities to discuss the Center's legality post-*Oakland Cannabis*." App., *infra*, 2a. Accordingly, the court of appeals held that the Redevelopment Commission "cannot possibly prevail on its innocent ownership defense." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case upholds the federal seizure of public money that the City of West Hollywood had devoted to the redevelopment and rehabilitation of blighted neighborhoods. Rejecting the innocent owner defense asserted by the City's Redevelopment Commission, the Ninth Circuit inserted a novel and extra-statutory requirement into the Civil Asset Forfeiture Reform Act ("CAFRA"): Under the Ninth Circuit's decision, it is not enough for an otherwise innocent owner to prove that he notified local law enforcement officials of the illegal conduct.

Instead, the Ninth Circuit required that, for federal violations, otherwise innocent owners notify a *federal* agency, notwithstanding notice to local law enforcement officers with full authority to arrest for federal offenses. That novel requirement is inconsistent with the statutory text and creates an unnecessary and inappropriate barrier to assertion of the innocent owner defense. The Ninth Circuit's decision, moreover, incorrectly construes CAFRA's illustrative examples of conduct that is sufficient to establish an innocent owner defense as the exclusive means of establishing that defense. Indeed, in so doing, the Ninth Circuit converted a quintessentially jury question of reasonableness into a legal question for the court, parting company with its sister circuits. Because of the importance of the innocent owner defense and the frequency of its assertion, these issues warrant further review.

A. The Ninth Circuit's Decision Is Inconsistent With The Principle That State and Local Officials May Enforce Federal Law

When Congress amended the asset forfeiture laws by enacting CAFRA in 2000, it expressed concern that the protections previously offered to innocent owners had been "seriously eroded" by judicial decision. H.R. Rep. No. 192, 106th Cong., 1st Sess. 15 (1999).[1] In response, CAFRA

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[1] In Senator Hyde's words, "[c]ivil asset forfeiture as allowed in our country today" had come to resemble proceedings in "the old Soviet Union, where justice is the justice of the government and the citizen did not have a chance." *Ramirez* v. *United States*, 57 Fed. Cl. 240, 250 (2003) (quoting 145 Cong. Rec. H4854 (daily ed. June 24, 1999)). Reform was needed to give "owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." *Ibid.* CAFRA thus had the "remedial" purpose of "correct[ing] an aberration that existed previously by leveling the playing field between the government and persons whose property has been seized." *United States* v. *Real Prop. in*

provided that a claimant's property cannot be forfeited if the claimant is an innocent owner, and that a claimant may qualify as an "innocent owner" if, among other things, the claimant shows that he or she "gave timely notice" of the illegal activity "to an appropriate law enforcement agency." 18 U.S.C. § 983(d)(2)(B)(i)(I). There is no dispute here that the City of West Hollywood gave timely (and repeated) notice of the activities being conducted at the seized building to the Los Angeles County Sheriff's Department, which had law enforcement responsibility within City boundaries.

The Ninth Circuit and the district court nonetheless held that the statutory requirement had not been met because the City had contacted state rather than federal officials. The district court stated that, because "the DEA was charged with enforcement of federal drug laws and [the Los Angeles Sheriff's Department] was charged with enforcement of state drug laws, giving notice only to [the Los Angeles Sheriff's Department] is not sufficient notice to an 'appropriate' law enforcement agency for purposes of enforcement of federal drug laws." App., *infra*, 20a. Reaching the same result, the Ninth Circuit held that the Redevelopment Commission could not prevail on its innocent owner defense because it failed to "contact *federal* law enforcement authorities." App., *infra*, 2a (emphasis added).

Those holdings defy statutory text and Congress's evident intent. Most naturally read, the phrase "appropriate law enforcement agency" should encompass at the very least all agencies with authority to enforce the laws at issue. In general, state or local law enforcement officers, no less than federal officers, have authority to make arrests for federal violations. See *United States* v. *Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) ("[T]his court has long

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Section 9, Town 29 N., Range 1 W. Township of Charlton, Otsego County, Michigan, 241 F.3d 796, 799 (6th Cir. 2001).

held that state and local law enforcement officers are empowered to arrest for violations of federal law, so long as the arrest is authorized by state law"); *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983) ("Illinois officers have implicit authority to make federal arrests"); *United States* v. *Haskin*, 228 F.3d 151, 154 (2d Cir. 2000) (state law permitting an officer to arrest "when the officer has probable cause to believe a person has committed or is committing a felony," allows "state officers to make an arrest where they have probable cause to believe that a federal felony is being or has been committed"), cert. denied, 531 U.S. 1175 (2001); *United States* v. *Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977) (state law empowering officers to arrest "without a warrant when a felony has been committed" or when "a warrant has been issued and is held by another peace officer" encompasses authority to arrest where a federal warrant was issued); see also *United States* v. *Di Re*, 332 U.S. 581, 591 (1948).

Courts in California, moreover, have repeatedly held that California law enforcement authorities may effect arrests for violations of federal law. See, *e.g.*, *Gates* v. *Los Angeles Superior Court*, 193 Cal. App. 3d 205, 215, 238 Cal. Rptr. 592, 598 (1987) (observing that, as a "general rule, * * * local police are not precluded from enforcing federal statutes," and holding that the California Penal Code, by authorizing peace officers to arrest for "a felony" or on "reasonable cause * * * to suspect a person has committed a felony," authorized the Los Angeles Police Department to "arrest for a federal violation of federal immigration law"); *Gonzales* v. *City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (holding that state officers may arrest for violations of federal immigration laws), overruled in part not relevant, *Hodgers-Durgin* v. *de la Vina*, 199 F.3d 1037 (9th Cir. 1999). Nowhere did the Ninth Circuit explain why the Los Angeles County Sheriff's Department—a law enforcement agency with full authority to make arrests for the conduct

at issue—cannot be an "appropriate law enforcement agency" within the meaning of Section 983(d)(2)(B)(i)(I). If Congress had intended to require notice to an appropriate *federal* law enforcement agency, it would have expressly so declared in CAFRA's text. That Congress did not do so speaks volumes about its intent.

The Ninth Circuit's decision to require notice to federal agencies for federal violations also establishes an unnecessary and artificial barrier to assertion of the innocent owner defense. Individuals confronting illegal activity may not have the resources, background, or time, to determine whether the criminal conduct at issue violates local ordinances, state law, federal law, or all three—much less to make fine distinctions among agencies to determine which specific agency has primary enforcement responsibility. Yet the district court here ruled that, because "*the DEA* was charged with enforcement of federal drug laws and *[the Los Angeles Sheriff's Department] was charged with enforcement of state drug laws*, giving notice only to [the Los Angeles Sheriff's Department] is not sufficient." App., *infra*, 20a. But, as shown above (pp. 9-10, *supra*), Sheriff's Department officers are hardly limited to the "enforcement of state drug laws," App., *infra*, 20a. To the contrary, they have ample authority to "arrest for a federal violation." *Gates*, 193 Cal. App. 3d at 215, 238 Cal. Rptr. at 598. More fundamentally, faulting a claimant for not distinguishing between the DEA and local law enforcement officers is like faulting a citizen who, happening upon a bank robbery, makes the mistake of screaming "help, police!" instead of "help, FBI!" See 18 U.S.C. 2113 (robbery of federally insured institutions a federal offense).[2] Such a parsimo-

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[2] In addition, the City knew that the DEA had already visited the facility and thus was aware of it. See p. 3, *supra*. It is hard to see why the City should be required to call the DEA to give it information the City knew the DEA already possessed. The statute

nious construction of the innocent owner defense is particularly inappropriate given Congress's intent, in enacting CAFRA, to overturn prior judicial decisions that had "seriously eroded" the scope of that defense. See p. 8, *supra*.

B. The Ninth Circuit Erroneously Construed The Statutory Safe Harbor As Exclusive

After holding that the Redevelopment Commission had not contacted an "appropriate" law enforcement agency within the meaning of Section 983(d)(2)(B)(i)(I), the Ninth Circuit also ruled that the Redevelopment Commission did not fall within Section 983(d)(2)(B)(i)(II) because it did not "in a timely fashion revoke or ma[k]e a good faith attempt to revoke permission for those engaging in [the illegal] conduct to use the property." See App., *infra*, 2a-3a.[3] Be-

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requires claimants to "do all that reasonably could be expected under the circumstances"—not to behave unreasonably by re-submitting to an agency the information the agency already has.

[3] The Ninth Circuit ruled that the Redevelopment Commission had not sought to revoke permission to use the property "in a timely fashion" because, five months after this Court decided *United States* v. *Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483 (2001), the Redevelopment Commission had not yet exercised its "contractual right" to "default the loan" and "institute foreclosure proceedings." App., *infra*, 2a. But Section 983(d)(2)(B)(i)(II) requires claimants to make "timely" efforts in light of the totality of the circumstances, not immediate efforts despite the circumstances. As the House Report accompanying CAFRA explains, the "good faith attempt" standard was included because, "in many instances, an owner may be constrained in revoking permission to use the property because of the provisions of local, state or federal law (i.e., contract or landlord tenant law)." H.R. Rep. No. 192, *supra*, at 15-16. The House Report further explains that, if it is "impossible to evict a tenant" under the circumstances, the statute "would not require an owner to go through the futile motion of seeking eviction in order to enjoy the protection of the safe harbor." *Id.* at 16 n.65. The Ninth Circuit, however, ignored all of the procedural requirements that California imposes on city governments (*e.g.*, the requirement of an open meeting of the City Council on prior notice, see Cal. Gov't Code

cause the Redevelopment Commission satisfied neither Section 983(d)(2)(B)(i)(I) nor (II), the Ninth Circuit ruled that the Redevelopment Commission "cannot possibly prevail on its innocent owner defense." App., *infra*, 3a.

That too was inconsistent with statutory text. By its terms, CAFRA does not make the actions listed in Sections 983(d)(2)(B)(i)(I) and (II)—giving timely notice to an appropriate law enforcement agency, and timely efforts to revoke permission for use of the property—the exclusive means of establishing an innocent owner defense. Rather, CAFRA lists those as *examples* of the sorts of reasonable efforts that will bring a claimant within the defense. Subsection 983(d)(2)(B)(i) begins by stating that, for "the purpose of this paragraph, *ways* in which a person may show such person did all that reasonably could be expected *may include* demonstrating * * * ." 18 U.S.C. § 983(d)(2)(B)(i) (emphasis added). Congress's use of the plural "ways" and the phrase "may include" make it clear that Congress intended the actions listed in Section 983(d)(2)(B)(i) to illustrate, not define, the conduct that can bring a claimant within the defense. This Court repeatedly has held that, where Congress uses phases like "may include" or "including," it does not intend to provide "an all embracing definition" but rather "an illustrative application of the general principle." *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("including"); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 181 (2003) (holding that use of the phrase "may include" shows "that the single enumerated example * * * was illustrative rather than exhaustive"); *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (Congress's use of the word "including" was designed "to indicate the 'illustrative and not limitative'

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§ 54950), and other governmental necessities (*e.g.*, the need to seek and obtain formal legal opinions, etc.) that, in governmental contexts, can convert five months into the blink of an eye.

function of the examples given"). Here, the general principle is that one who acts reasonably in response to potentially illegal conduct is entitled to an innocent owner defense. The examples given by Section 983(d)(2)(B)(i)(I) are (II) are merely illustrations of reasonable responses.

CAFRA's legislative history confirms that Section 983(d)(2)(B)(i)(I) and (II) are merely illustrations—not mandatory elements—of the types of efforts that can establish an innocent owner defense. The House Report states that Section 983(d)(2)(B)(i) addresses "*one way* in which an owner may show that he did all that reasonably could be expected under the circumstances." H.R. Rep. No. 192, *supra*, at 15 (emphasis added); see *id.* at 25 (similar). And it goes on to describe the statute as creating "a safe harbor" for the owner who undertakes those efforts. *Ibid.* To meet the requirements of the defense, the House Report further declares, "the property owner is *not* required to take *every* conceivable action which could be considered reasonable, but only to take actions which *are in total a reasonable response* to the conduct giving rise to the forfeiture." *Id.* at 23 (emphasis added).

The Ninth Circuit in this case made no effort to determine whether the City Redevelopment Commission's actions were "in total a reasonable response to the conduct giving rise to the forfeiture." Instead, the Ninth Circuit applied the statutory example of reasonable efforts as if it were an inflexible checklist. For example, the district court and the Ninth Circuit faulted the City for having extensive contact with the Los Angeles Sheriff's Department rather than federal authorities like the DEA. See App., *infra*, 2a, 20a; see also pp. 9-11, *supra*. But the City *knew* that the DEA was *already aware* of the LACRC's activities. The DEA, in fact, had visited the LACRC's facilities. See pp. 3, 11 n.2, *supra*. Surely the "reasonable response" standard does not require a claimant to waste an agency's time by re-notifying it of activities of which the agency is already

aware. That is particularly true where, as here, the claimant is in touch with another law enforcement agency (the Sheriff's Department) with full authority to arrest for the illegal conduct.

The same defect infects the Ninth Circuit's analysis of the City's failure to declare the LACRC in default, and to initiate foreclosure proceedings, within five months of this Court's decision in *United States* v. *Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483 (2001). See App., *infra*, 2a-3a. For much of the time that the LACRC was operating in West Hollywood, its provision of medical marijuana was deemed lawful in California by virtue of the Ninth Circuit's decision in *United States* v. *Oakland Cannabis Buyer's Cooperative*, 190 F.3d 1109 (1999). Even after this Court reversed that decision in 2001, there remained significant doubts as to whether the LACRC's conduct was proscribed by a valid Act of Congress. For example, this Court's decision in *Oakland Cannabis* reserved whether the Controlled Substances Act exceeds Congress's powers under the Commerce Clause as applied to home-grown, in-state marijuana like that employed by the LACRC. 532 U.S. at 495, n.7. The Ninth Circuit later held that the Controlled Substances Act exceeded Congress's Commerce Clause powers. *Raich* v. *Ashcroft*, 352 F.3d 1222 (9th Cir. 2003). And this Court did not reverse that decision until 2005, years after the DEA filed suit to forfeit the property. *Gonzalez* v. *Raich*, 125 S. Ct. 2195 (2005). Given that series of rulings, it was far from clear that the Redevelopment Commission even had the legal right to declare the LACRC in default for engaging in unlawful conduct and to initiate foreclosure proceedings on its loan after this Court's *Oakland Cannabis* decision. To the contrary, that did not become clear in the Ninth Circuit until years later.

Moreover, during the five-month period following this Court's *Oakland Cannabis* decision, the City knew that two different law enforcement agencies—the primary law

enforcement agency within its boundaries (the Los Angeles Sheriff's Department) and the DEA—were fully aware of the LACRC's activities and had taken no action against it. Given those agencies' inaction, it can hardly be deemed unreasonable for a governmental entity like the City to take five months to evaluate the Court's decision, obtain legal advice from its attorneys, conduct the necessary meetings with the notices required by California law, and to vote on and pursue a chosen course of conduct. See p. 12 n.3, *supra*. Indeed, it took the trial court in *Oakland Cannabis* considerably longer—eight months—to issue its decision on remand. See *United States* v. *Cannabis Cultivator's Club*, 2002 WL 1310460 (N.D. Cal. 2002). In any event, the Ninth Circuit failed to consider any of these issues, because it erroneously read the statutory examples in Section 983(d)(2)(B)(i)(I) and (II) of CAFRA as providing the exclusive method of becoming an innocent owner, rather than as "safe harbors" or illustrations of the sorts of actions that are ordinarily sufficient.

The decision in this case is, as a result, impossible to reconcile with the decisions of other Circuits holding that the reasonableness of a claimant's conduct—whether the property owner's actions were "in total a reasonable response to the [illegal] conduct" on the property, H.R. Rep. No. 192, *supra*, at 23—is in the main a question for the jury to resolve. As the Second Circuit has explained, in general, the "existence of efforts *and their reasonableness*, is for the trier of fact." *United States* v. *One Parcel of Property Located at 121 Allen Place, Hartford, Connecticut*, 75 F.3d 118, 122-123 (2d Cir. 1996) (emphasis added); accord *United States* v. *Lot Numbered One of the Lavaland Annex*, 256 F.3d 949, 950 (10th Cir. 2001) (explaining that "the court's own sense of what would have been reasonable provides an insufficient basis to reject the innocent owner defense"). Here, by treating CAFRA's examples of reasonable efforts as an exclusive list, the Ninth Circuit and

the district court resolved for themselves a question of "reasonableness" that in other circuits would have been reserved for the jury. For that reason too, this Court's review is warranted.

C. The Issues Are Important And Recurring

The proper construction of the innocent owner defense under CAFRA is an issue of significant and recurring importance. In 2005, the United States invoked CAFRA to effect thousands of seizures involving more than $570 million in property—over $50 million of that in California alone. U.S. Dep't of Justice, Total Net Deposits to Asset Forfeiture Fund as of September 30, 2005 <www.usdoj.gov/jmd/afp02fundreport/2005affr/report1.htm>. Since 2000, those seizures total more than $2.5 billion, $420 million of that in California.[4] Such figures are large in their own right. But they understate the impact of seizures on the myriad claimants whose assets—perhaps life savings—may be seized by the government even though the individuals themselves have engaged in no criminal misconduct. Given the enormous number of cases that involve assertion of an innocent owner defense in the courts of appeals[5] and the

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[4] See <www.usdoj.gov/jmd/afp02fundreport/2005affr/report1.htm>; <www.usdoj.gov/jmd/afp02fundreport/2004affr/report1.htm>; <www.usdoj.gov/jmd/afp02fundreport/2003affr/report1.htm>; <www.usdoj.gov/jmd/afp02fundreport/2002affr/report1.htm>; <www.usdoj.gov/jmd/afp02fundreport/2001CAFRAReports/report1.htm>.

[5] See, *e.g.*, *United States* v. *Bailey*, 419 F.3d 1208 (11th Cir. 2005); *United States* v. *144,774 pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir.), cert. denied, 126 S. Ct. 828 (2005); *United States* v. *$242,484.00*, 389 F.3d 1149 (11th Cir. 2004); *United States* v. *Real Property Located at 5208 Los Franciscos Way, Los Angeles, Cal.*, 385 F.3d 1187 (9th Cir. 2004), cert. denied, 544 U.S. 1050 (2005); *United States* v. *One Parcel of Real Property with Buildings, Appurtenances and Improvements at 45 Claremont St., in Central Falls, R.I.*, 108 Fed.Appx. 651 (1st Cir. 2004); *United States* v. *One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003); *United States*

district courts alike,[6] clear and uniform guidance on the defense's scope is imperative.

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v. *$80,180.00 in U.S. Currency*, 303 F.3d 1182 (9th Cir. 2002); *Krimstock* v. *Kelly*, 306 F.3d 40 (2nd Cir. 2002), cert. denied, 539 U.S. 969 (2003); *United States* v. *16328 South 43rd East Ave., Bixby, Tulsa County, Okla.*, 275 F.3d 1281 (10th Cir. 2002); *United States* v. *Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002); *Vereda, Ltd.* v. *United States*, 271 F.3d 1367 (Fed. Cir. 2001).

[6] *United States* v. *One Parcel of Property Located at 1515 15th Place, Clanton, Chilton County, Alabama*, 2006 WL 1731170 (M.D. Ala. 2006); *United States* v. *$14,600.00 in U.S. Currency*, 2006 WL 1041796 (D. Neb. 2006); *United States* v. *$26,620.00 in U.S. Currency*, 2006 WL 949938 (N.D. Ga. 2006); *United States* v. *11,922,300 Cigarettes*, 2006 WL 850890 (E.D. Wash. 2006); *United States* v. *$21,771.00*, 2006 WL 861328 (W.D. Ky. 2006); *United States* v. *74.05 Acres of Land*, 428 F. Supp. 2d 57 (D. Conn. 2006); *United States* v. *$114,399.62 in U.S. Currency*, 2006 WL 305757 (E.D. Mich. 2006); *United States* v. *392 Lexington Parkway South, St. Paul, Minn.*, 386 F. Supp. 2d 1062 (D. Minn. 2005); *United States* v. *Approximately $44,888.35 in Currency*, 385 F. Supp. 2d 1057 (E.D. Cal. 2005); *United States* v. *Approximately 600 Sacks of Green Coffee Beans Seized from Cafe Rico, Inc.*, 381 F. Supp. 2d 57 (D. P.R. 2005); *United States* v. *Assorted Jewelry with an Approximate Value of $219,860.00*, 386 F. Supp. 2d 9 (D. P.R. 2005); *United States* v. *2000 Toyota Celica*, 2005 WL 1502902 (E.D. Wash. 2005); *United States* v. *One Parcel of Property Located at 32 Medley Lane, Branford, Conn.*, 372 F. Supp. 2d 248 (D. Conn. 2005); *Dosunmu* v. *United States*, 361 F. Supp. 2d 93 (E.D.N.Y. 2005); *United States* v. *Funds From Prudential Securities*, 362 F. Supp. 2d 75 (D.D.C. 2005); *United States* v. *$293,316 in U.S. Currency*, 349 F. Supp. 2d 638 (E.D.N.Y. 2004); *United States* v. *198 Training Field Road*, 2004 WL 1305875 (D. Mass. 2004); *United States* v. *Real Property in Section 9, Town 29 North, Range 1 West, Twp. of Charlton, Otsego County, Mich.*, 308 F. Supp. 2d 791 (E.D. Mich. 2004); *United States* v. *$746,198 in U.S. Currency*, 299 F. Supp. 2d 923 (S.D. Iowa 2004); *Concepcion* v. *United States*, 298 F. Supp. 2d 351 (E.D.N.Y. 2004); *United States* v. *$21,000 in U.S. Postal Money Orders and $785 in Currency*, 298 F. Supp. 2d 597 (E.D. Mich. 2003); *United States* v. *$21,510 in Currency*, 292 F. Supp. 2d 318 (D. P.R. 2003); *United States* v. *One 1988 Checolet 410 Turbo Prop Aircraft*, 282 F. Supp. 2d

Indeed, for those confronting a seizure, the innocent owner defense provides necessary protection against the potential for government mistakes or over-reaching. Explaining the need for a uniform innocent owner defense in CAFRA, the House Report decried earlier decisions that had diluted the defense, and recounted numerous instances in which individuals "very likely innocent of any crime justifying forfeiture" were subjected to seizures or forfeitures and resulting financial hardships. See H.R. Rep. No. 192, *supra*, at 8. See also *id.* at 10 (seizure of motel, where management had repeatedly called police to complain of illegal activity, because manager had not complied with the government's request that it implement "security measures" such as raising rates); *id.* at 6-7, 9-10 (seizure of cash from businesses or persons operating cash businesses); *id.* at 8-9 (seizure of airplanes from legitimate charter service).

The Ninth Circuit's decision in this case once again "seriously erodes" the innocent owner defense that Congress sought to resuscitate and protect in CAFRA. H.R. Rep. No. 192, *supra*, at 15. To ensure that the defense would "offer[] protection in all appropriate cases," *ibid.*, Congress adopted a broad and flexible standard. Simply put, an owner is entitled to assert that defense so long as he does "all that reasonably could be expected under the circumstances." 18 U.S.C. § 983(d)(2)(A)(ii); see also H.R. Rep. No. 192, *supra*, at 23 ("the property owner is not required

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1379 (S.D. Fla. 2003); *United States* v. *Grass*, 274 F. Supp. 2d 648 (M.D. Pa. 2003); *United States* v. *All Funds on Deposit in Dime Sav. Bank of Williamsburg Account No. 58-400738-1 in the Name of Ishar Abdi and Barbara Abdi*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003); *United States* v. *2001 Honda Accord*, 245 F. Supp. 2d 602 (M.D. Pa. 2003); *United States* v. *One Residential Property Located at 8110 E. Mohave Road, Paradise Valley, AZ*, 229 F. Supp. 2d 1046 (S.D. Cal. 2002); *United States* v. *Six Negotiable Checks in Various Denominations Totaling $191,671.69*, 207 F. Supp. 2d 677 (E.D. Mich. 2002).

to take every conceivable action * * * but only to take actions which are in total a reasonable response"). Under the Ninth Circuit's decision, the reasonableness of the City's response here became totally irrelevant. Depriving the test of its intended flexibility and generality, the Ninth Circuit instead transformed the statutory example of reasonable behavior—a safe harbor for those who contact legal authorities and attempt eviction—into a list of mandatory elements. In this case, moreover, the Ninth Circuit applied that truncated statutory formula to affirm the forfeiture of taxpayer dollars invested by the City of West Hollywood to relieve blight in a redevelopment area of the City. Accordingly, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 2006

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

WEST HOLLYWOOD COMMUNITY
REDEVELOPMENT COMMISSION,
Claimant - Appellant,

v.

REAL PROPERTY LOCATED AT 7494 AND
7501 SANTA MONICA BOULEVARD,
WEST HOLLYWOOD, CALIFORNIA
Defendant.

No. 04-56043,
D.C. No. CV-02-04176-R

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted February 6, 2006
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: **KOZINSKI, TROTT** and **BEA**, Circuit Judges.

As applied to the Center, the Controlled Substances Act is a valid exercise of Congress's Commerce Clause power. *See Gonzales* v. *Raich*, 125 S. Ct. 2195, 2205-09 (2005). Thus, claimant's interest in the defendant property is subject to forfeiture. *See* 21 U.S.C. § 881(a)(7).

Claimant argues that its cooperation with the Los Angeles Sheriff's Department and its reliance on Ninth Circuit caselaw qualify it as an innocent owner of defendant property. We express no view as to whether claimant's actions satisfied the innocent ownership requirements of 18 U.S.C. § 983(d) prior to the Supreme Court's decision in *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

It is clear, however, that after that decision, claimant did not do "all that reasonably could be expected under the circumstances to terminate [illegal] use of the property." 18 U.S.C. § 983(d)(2)(A)(ii).** *Oakland Cannabis* rejected the argument that there was a medical necessity exception to the Controlled Substances Act, and thereby put claimant on notice (if it wasn't already) that the Center's activities violated federal law. *Oakland Cannabis*, 532 U.S. at 486. Nevertheless, claimant did nothing to terminate illegal use of the property: Although it had a contractual right to default the loan and institute foreclosure proceedings in court, it didn't. Nor did it contact federal law enforcement authorities to discuss the Center's legality post-*Oakland Cannabis*. Five months after the Supreme Court's decision, illegal use of the property was ongoing—the DEA seized over five hundred marijuana plants and over one hundred

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** Claimant does not and could not argue that it "did not know" of the Center's conduct. 18 U.S.C. § 983(d)(2)(A)(i). Because claimant cannot satisfy the requirements of section 983(d)(2)(A), we need not decide whether claimant also fails to satisfy the requirements of section 983(d)(3)(A).

pounds of marijuana at the Center. The district court thus correctly concluded that claimant cannot possibly prevail on its innocent ownership defense.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO. CV 02-4176-R,
[CONSOLIDATED ACTION]

UNITED STATES OF AMERICA,
Plaintiff,

v.

$55,908.58 IN FUNDS SEIZED FROM WELLS FARGO BANK ACCOUNT NOS. 037-2068957, 636-9732813, 624-6386437, 075-8539936, AND 075-8539928, IN THE NAME OF LOS ANGELES CANNABIS RESOURCE CENTER,
Defendant,

L.A. CANNABIS RESOURCE CENTER AND SCOTT IMLER,
Claimants.

NO. CV 02-4176-R (CTX),

UNITED STATES OF AMERICA,
Plaintiff,

v.

REAL PROPERTY LOCATED AT 7494 AND 7501 SANTA MONICA BOULEVARD, WEST HOLLYWOOD, CALIFORNIA,
Defendant,

L.A. CANNABIS RESOURCE CENTER, INC.; SCOTT IMLER; WELLS FARGO BANK, N.A.; AND WEST HOLLYWOOD COMMUNITY DEVELOPMENT COMMISSION,
Claimants.

NO. CV 02-4724-R (CTX)

UNITED STATES OF AMERICA,
Plaintiff,

v.

REAL PROPERTY LOCATED AT 343 LOCKWOOD VALLEY ROAD, FRAZIER PARK, CALIFORNIA,
Defendant,

JUDY M. OSBURN AND LYNN W. OSBURN,
Claimants.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

DATE: [APRIL 5, 2004]
TIME: 10:00 A.M.
COURT: HON. MANUEL L. REAL

Upon consideration of plaintiff's motion for summary judgment or, alternatively, for summary adjudication of issues; the memorandum of points and authorities, declarations, and exhibits; the papers filed by the parties in connection with the motion; and pleadings and other papers

on file herein, the Court makes the following findings of uncontroverted facts and conclusions of law:

I

UNCONTROVERTED FACTS

A. Background of the LACRC

1. In approximately spring of 1996, LACRC began operating as the Los Angeles Cannabis Buyers' Club in Santa Monica, pooling money to buy marijuana. (Imler Depo. [Lee Decl. Ex. 29] at 10:7-24). In August 1996, the club moved to West Hollywood, eventually settling in at 7494 Santa Monica Boulevard in November 1996. (*Id.* at 13:2-20). The City of West Hollywood became aware that the club was distributing marijuana from the time it moved to West Hollywood because the club never sought to conceal that fact. (*Id.* at 17:18-19:6). The club also held a free marijuana giveaway at its premises, with "a lot of media around." (*Id.* at 19:9-20:2). LACRC formally incorporated in January 1997. (*Id.* at 9:8-24).

B. LACRC's Alliance With West Hollywood and LASD

2. Before Proposition 215 passed, in late 1995 or early 1996, West Hollywood's City Council passed a resolution in favor of "medical marijuana." (Odenthal Depo. [Lee Decl. Ex. 35] at 32:8-33:19). A few months later, Nancy Greenstein, the City's then Public Safety Manager, approached then Los Angeles Sheriff's Department ("LASD") Captain Richard Odenthal, Commander of LASD's West Hollywood station, and asked what LASD's position would be if a "medical marijuana" distributor was to set up quietly in the City. (*Id.* at 26:17-27:19).

3. Captain Odenthal spoke with his Division Chief Lee Baca and Division Commander Bill Mangan and, eventually, the LASD developed the policy that it would not seek to close down the club. (*Id.* at 30:20-31:3; 32:8-19). This policy was developed before passage of Proposition 215. (*Id.* at 33:13-34:11). Captain Odenthal then undertook no

raids of the club, even before passage of Proposition 215. (*Id.* at 41:20-23). In 1998 or 1999, when LASD received a complaint about the club from a tenant in the same building, Captain Odenthal dismissed the complaint as being baseless even though his investigators did not go inside the club itself. (*Id.* at 35:13-36:24; 50:10-51:3).

4. In 1996, before Proposition 215 passed, LASD's Narcotics Unit went to the club and closed it down without notifying higher officials of LASD or obtaining advance permission. (*Id.* at 39:15-21). Representatives of the City then complained to LASD. (*Id.* at 40:9-13). Lee Baca offered an explanation, after which the LASD's Narcotics Unit conducted no more raids. (*Id.* at 40:9-41:19).

5. Captain Odenthal understood that, before Proposition 215 passed, California's Heath and Safety Code expressly prohibited distribution of marijuana. (*Id.* at 53:21-54:1). Nevertheless, he continued to allow the distribution of marijuana at the club even before Proposition 215 passed. (*Id.* at 54:3-8). This was because the decision to do so was made "at the highest level of the Sheriff's Department." (*Id.* at 54:9-12).

6. On December 16, 1996, Imler met with Greenstein, Captain Odenthal, and John Heilman, then Councilman for the City. (Imler Depo. at 22:14-23:10). Following this meeting, the City adopted, with a few changes, LACRC's own rules and procedures regarding how LACRC would operate and a "gentleman's agreement" was reached between LACRC and the City. (*Id.* at 24:6-18). The agreement included rules regarding how much marijuana could be distributed and other matters. (*Id.* at 24:19-25).

7. In the summer of 1997, LACRC made reports to the City on a biannual basis. (Imler Depo. at 27:18-20). After such a report, the mayor of West Hollywood expressed concern about the amount of marijuana LACRC was buying and encouraged it to grow more marijuana. (*Id.* at 27:18-

28:10). Using $50,000, LACRC purchased equipment and rented 1500 square feet of additional space on the mezzanine to grow additional marijuana. (*Id.* at 28:11-30:2).

8. In the spring of 1998, the mayor of West Hollywood gave an interview with CBS News in LACRC's marijuana grow room. (*Id.* at 30:3-11). Council member John Duran and WHCDC's Allyne Winderman also visited LACRC's marijuana grow room. (*Id.* at 30:19-31:12).

9. Captain Odenthal retired from LASD on September 6, 2000 and began working for West Hollywood as its Public Safety Administrator on September 16, 2000. (Odenthal Depo. at 46:10-14).

10. At no time did any representative of the City of West Hollywood ever try to get LACRC to shut down, stop growing marijuana, or stop distributing marijuana. (*Id.* at 59:1-22; 60:18-61:10). Nor did anyone from the City ever seek to close down the business in other ways without going to LASD, such as revoking any business license. (*Id.* at 59:16-60:17). When Captain Odenthal was employed by LASD, the Department "understood fully what the Federal law was" and the Sheriff knew that "he couldn't control DEA, the FBI, or any of the other Federal agencies and to some extent State agencies." (*Id.* at 62:8-63:4). Captain Odenthal communicated this fact to Imler. (*Id.* at 63:13-19). He also communicated this fact "to the West Hollywood City representatives while [he] was the captain of the sheriff's station," including Greenstein and the City manager." (*Id.* at 64:8-23).

C. <u>LACRC's Attempts to Obtain IRS and DEA Approvals</u>

11. In 1998, LACRC applied to the Internal Revenue Service ("IRS") to obtain federal tax exemption status as a non-profit corporation. (Imler Depo. at 43:10-23). After reviewing LACRC's information, the IRS [r]ejected the application on the grounds that LACRC did not serve a public

purpose and that "growing marijuana was against federal law." (*Id.* at 44:21-45:23). LACRC kept the City of West Hollywood apprised of its "trouble" in obtaining a federal tax exemption status from the IRS before WHCDC made its loan to LACRC. (*Id.* at 45:25-46:9; 57:2-14).

12. In 1999, the LACRC applied with the Drug Enforcement Administration ("DEA") for a license to manufacture marijuana. (*Id.* at 41:2-11). DEA's diversion investigators came to inspect LACRC's facility, where marijuana was seen being grown. (*Id.* at 42:7-16). The DEA advised LACRC of its decision not to grant the application and requested that LACRC withdraw the application, which it did. (*Id.* at 43:2-9).

13. Neither the IRS *nor* the DEA ever advised LACRC that it was in compliance with federal law. (*Id.* at 63:19-64:2); Zavacky Decl., ¶ 31).

D. Wells Fargo's Loan to LACRC

14. In April or May 1999, LACRC approached West Hollywood, seeking assistance in buying the building at 7494 Santa Monica Boulevard. (*Id.* at 34:14-35:1; 80:17-24). LACRC's purpose in doing so was to become self-sufficient by cultivating its own marijuana. (*Id.* at 34:10-13). Councilman Heilman referred LACRC to the Deputy Executive Director of West Hollywood Community Development Commission ("WHCDC"), Allyne Winderman, who suggested that LACRC first obtain a loan from a commercial bank in order to obtain a second mortgage from the City. (*Id.* at 34:17-36:5).

15. After an initial unsuccessful attempt with another bank, in April or May 2000, LACRC approached Senior Commercial Lender Mark Wilhelm of Wells Fargo Bank, N.A. ("Wells Fargo") about a loan to buy the building. (*Id.* at 65:19-21). Imler identified the name of his organization as being the Los Angeles Cannabis Resource Center. (*Id.* at 66:24-67:1). Wilhelm knew that LACRC grew and distri-

buted marijuana. (*Id.* at 67:16-23). LACRC did not hide the fact that it grew and distributed marijuana and was fairly open about this fact. (*Id.* at 18:6-15; 68:2-6). Wilhelm acknowledged that the bank knew "from the beginning" that LACRC grew and distributed marijuana. (Wilhelm Depo. [Lee Decl. Ex. 31] at 31:3-9; 31:24-32:12; 57:13-58:16; Lim Depo. [Lee Decl. Ex. 32] at 21:16-22; Fracchia Depo. [Lee Decl. Ex. 33] at 11:22-12:5).

16. LACRC's loan application with Wells Fargo expressly described LACRC's product or service as "cultivat[ing] and distribut[ing] medical marijuana to qualified individuals." (Lee Decl. Ex. 14 at 2; Wilhelm Depo. at 46:12-18). Further, an appraisal obtained by Wells Fargo also expressly described "approximately 1,600 square feet of mezzanine space between the 1st and 2nd floor that is currently utilized by the L.A. Cannabis Resource Center for growing medicinal marijuana for their business" and provided a clearly visible half-page photograph of the countless marijuana plants being grown on site. (Lee Decl. Ex. 18 at WF0822 and WF0848). LACRC also provided Wells Fargo with its tax returns, financial statements describing its assets and liabilities and profits and losses, and other information. (Wilhelm Depo. at 71:3-13). Additionally, Wilhelm himself visited LACRC's premises and saw "[s]omewhere between ten and a thousand" marijuana plants ranging up to four or five feet tall being grown there. (Wilhelm Depo. at 33:14-16; 38:10-22).

17. No one at Wells Fargo expressed any concern to LACRC about the fact that it grew and distributed marijuana. (Imler Depo. at 68:7-13). Wilhelm spoke with two other persons at Wells Fargo, Senior Credit Officer Cheng Hooi Lim and Chief Credit Officer Don Anthony Fracchia, regarding the fact that LACRC grew and distributed marijuana. (Wilhelm Depo. at 54:9; 56:1-57:6; 81:20-82:17). Lim asked Wilhelm whether he had checked with "upper management" and Wilhelm stated he had checked with Fracchia

and was told "we could proceed with the loan." (Lim Depo. at 24:10-25:23; Fracchia Depo. at 11:16-17:17). Lim then approved the $780,000 loan, which was within his authorization limit. (Lim Depo. at 25:24-26:8; 34:14-35:12; Fracchia Depo. at 10:21-23).

18. Wells Fargo made its loan principally because LACRC was creditworthy and the property was sufficiently collateralized, and LACRC was thought to be providing a community service. (Wilhelm Depo. at 82:18-85:8; Lim Depo. at 32:5-36:24; 39:23-40:10; Lee Decl. Exs. 15 & 16; Fracchia Depo. at 13:5-24).

19. No one at Wells Fargo ever asked LACRC to stop growing or distributing marijuana. (Imler Depo. at 69:23-25; Wilhelm Depo. 57:7-12; 75:24-77:4; Lim Depo. at 40:20-41:21). No one at the bank attempted to report LACRC to any law enforcement agency. (Imler Depo. at 70:6-8; Wilhelm Depo. at 77:5-22; Fracchia Depo. at 21-25). No one at the bank attempted to default LACRC on its loan because of its marijuana activities. (Imler Depo. at 71:12-14; Lim Depo. at 44:24; Fracchia Depo. at 22:1-3). Wells Fargo's own "SimplyDocs" Business Lending Disclosure permitted it to default the loan if any representations regarding LACRC's compliance with "all applicable laws" were untrue. (Wilhelm Depo. 65:16-67:23; Lee Decl. Ex. 22 at WF0754 and F0758).

E. <u>WHCDC's Loan to LACRC</u>

20. LACRC obtained an additional loan of $300,000 and a rehabilitation grant of $50,000 from WHCDC, whose members consisted of the West Hollywood's City Council. (Winderman Depo. [Lee Decl. Ex. 34] at 38:13-24). WHCDC's Deputy Executive Director Allyne Winderman, who administered its day-to-day activities, handled the loan. (*Id.* at 16:22-25; 18:18-19:8; 45:15-21). Winderman and WHCDC understood that LACRC distributed marijuana. (*Id.* at 47:20-48:14; 23:10-24:3).

21. In support of the loan, LACRC provided Winderman with various financial and other documents, including a two-year business plan, which Winderman reviewed "[t]o see if they were fiscally responsible, it was a viable loan. Typical underwriting." (*Id.* at 54:23-55:4; Lee Decl. Exs. 15, 23, 24). Also, given that the purpose of WHCDC is to "reverse blight in a community," the fact that they were going to occupy the building was a plus. (*Id.* at 17:5-16; 56:5-18).

22. The source of funding for the redevelopment project was "tax increment financing," meaning that the project was financed from unallocated general reserves and ultimately paid from the incremental increase in property tax revenues from project improvements within the City, rather than any increase in general taxes. (*Id.* at 29:9-30:16; 104:13-20; 105:24-106:19).

23. LACRC did not hide from WHCDC the fact that it was growing and distributing marijuana and it was open about this fact to WHCDC as well. (*Id.* at 18:6-15; 38:20-25). Winderman and WHCDC understood that, in buying the building, LACRC's goal was to expand production of marijuana and become self-sufficient. (*Id.* at 61:15-62:5). Additionally, Winderman went to the site and saw a "lot" of marijuana plants. (*Id.* at 68:23-69:24). Although she was surprised at the site of the marijuana plants, Winderman did not do anything about the fact that LACRC was growing marijuana because she thought, "[t]hat was their business." (*Id.* at 71:8-73:8).

24. On April 17, 2000, Winderman drafted a staff report for the WHCDC, recommending approval of the loan and grant. (*Id.* at 63:24-64:10). The report stated that LACRC's income "would support the mortgage both from the bank and the Agency" and that the project would accomplish the goals of the redevelopment plan, including eliminating blight. (Lee Decl. Ex. 26 at 2). That same day, WHCDC approved the loan and grant. (*Id.* Ex. 27 p. 17).

25. After LACRC's unsuccessful attempt to obtain a loan from the first bank, the proposal came before WHCDC again on September 5, 2000. (Winderman Depo. at 85:23-86:6). Winderman again drafted a similar staff report (Lee Decl. Ex. 28) and the proposal was again approved by WHCDC that same day (*id.* Ex. 29).

26. Following WHCDC's approval on September 5, 2000, there was a several-week delay because Councilman Heilman was concerned about federal law. (Imler Depo. at 37:10-38:4). Councilman Heilman was concerned about LACRC's possible violation of federal law and thus developed an exit strategy for LACRC, which became Paragraph 4.1.5 of the loan agreement. (*Id.* at 57:15-18; 64:10-19; 88:11-89:9). Councilman Heilman wanted to ensure that LACRC did not get "stuck with the building if [LACRC] were forced to close down" because of federal law. (*Id.* at 60:20-61:4).

27. No one at the City or WHCDC ever asked LACRC to stop growing or distributing marijuana. (*Id.* at 69:23-70:5; Winderman Depo. at 95:20-23; 97:8-14). Moreover, no one at the City or WHCDC attempted to report LACRC to any federal law enforcement agency. (Imler Depo. at 70:6-8; 71:3-11; Winderman Depo. at 97:15-18). Other than their own attorneys, no one at the City or WHCDC ever spoke to anyone about the issue of whether what LACRC was doing violated federal law. (Winderman Depo. at 95:15-19). Further, no one at the City or WHCDC attempted to default LACRC on its loan because of its marijuana cultivation and distribution activities or any other reason. (Imler Depo. at 71:12-14; Winderman Depo. at 114:5-16). The Loan Agreement required LACRC to use the property for lawful purposes under all laws and allowed WHCDC to declare a default or termination for violations by LACRC. (Lee Decl. Ex. 28, Art. 4.1.5, 5.1, 5.9).

F. The LACRC's Purchase and Use of the Defendant Property

28. Escrow on the defendant property closed on October 6, 2000. (Lee Decl. Ex. 4 at 1). LACRC purchased the defendant property for $1.2 million, providing a down payment of $120,000 and loans of $780,000 from Wells Fargo and $300,000 from WHCDC. (Imler Depo. at 71:19-24; Zavacky Decl., ¶ 18). The $20,000 down payment is traceable to check no. 1041 from LACRC's Basic Checking Account No. 0372-068957, into which payments from members for contributions received in exchange for marijuana disbursements were deposited. (Zavacky Decl., ¶ 19 & Exs. 5 & 6). The balance of the down payment is traceable to payments of $59,545 and $50,000 made from LACRC's Premium Market Rate Account No. 6369-732813, into which payments from members for contributions received in exchange for marijuana disbursements were also deposited. (*Id.*, ¶¶ 21-26 & Exs. 7-12). Beginning in or about November 2000, payments for the monthly mortgages to Wells Fargo and WHCDC were made by LACRC from its Basic Checking Account. (*Id.*, ¶¶ 27-28 & Ex. 5).

29. The source of approximately 99 to 100 percent of LACRC's income came from its member "contributions." (Imler Depo. at 71:15-72:8; Yablan Depo. at 31:4-32:9). Only about four percent of these members received no marijuana after the first day, when everyone received a "welcome-to-the-club" marijuana disbursement. (Imler Depo. at 72:18-24). People who did not continue to receive marijuana, however, still wanted to be listed in LACRC's registry. (*Id.* at 73:1-18).

30. At the time of the DEA's search of the defendant property, LACRC had approximately 960 active members and 902 inactive members. (*Id.* at 36:13-15). LACRC did not keep track of whether its inactive members may have moved out of the state. (*Id.* at 36:20-23).

31. Besides marijuana plants, LACRC had growing equipment and computers. (*Id.* at 33:1-5). Approximately $20,000 was spent on lighting and other grow equipment purchased from many hydroponic stores. (*Id.* at 34:12-24). Approximately $15,000 was invested on about six computer terminals, a server, printers, and a membership card making equipment. (*Id.* at 34:25-35:21). The computers had internet access and were used for "a lot of research" regarding medical marijuana and the law, "a lot of e-mail correspondence" with members, and accessing on-line banking services set up by Wells Fargo. (*Id.* at 33:10-34:11; Zavacky Decl., ¶ 10). LACRC also had a rollover telephone system established by Pac Bell, comprised of three phone lines plus another line for the computer, as well as a fax machine used by LACRC to send to and receive letters from doctors. (*Id.* at 35:22-36:12; Zavacky Decl., ¶ 12). LACRC also used mail service at the site. (Zavacky Decl., ¶ 11).

32. On October 25, 2001, a federal search was served at the defendant property. (*Id.*, ¶ 9). The DEA was aware in this case that LASD desired not to arrest LACRC members, to search its premises, or otherwise pursue enforcement activities consistent with federal laws. (*Id.*, ¶ 8). Accordingly, in obtaining and in executing a federal search warrant on the LACRC premises, the DEA did not advise LASD in advance because of concerns that the LASD might notify LACRC members of the DEA investigation. (*Id.*)

33. At the site, DEA agents found approximately 569 cultivated marijuana plants, approximately 61.08 kilos of marijuana, various marijuana seeds, and marijuana manufacturing equipment, including 55 hooded lights, 14 light rail motors, 8 sun circles, 57 ballasts, and 4 rolls of Mylar. (Id., ¶ 9).

34. Additional evidence found at the defendant property indicated that it maintained several bank accounts at Wells Fargo Bank. (Zavacky Decl., ¶ 13). An electronic card-swiping device was observed next to the LACRC's cash

register at the defendant property. (*Id.*). Stickers nearby indicated that LACRC accepted payments for marijuana distributions by bank card, Visa, and MasterCard. (*Id.*). Computer-generated spreadsheets found at the property showed that between April 3, 2000 and December 22, 2000, LACRC had total receipts of $1,142,000.39, comprised of $630,203 in cash, $171,713.34 in checks, $336,562 in card receipts, and $3,522.05 in other receipts. (*Id.*, ¶ 16 & Ex. 2).

35. Any conclusion of law which is deemed to be a finding of fact is hereby incorporated herein.

II

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1345 and 1355.

2. Section 881(a)(7) of Title 21 provides for the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). Marijuana is a controlled substance classified as a Schedule I drug, meaning that it has "no currently accepted medical use in treatment in the United States." 21 U.S.C. § 811(b)(2) & (c), Schedule I(c)(10). Its manufacture, distribution, or dispensation, or possession with intent to manufacture, distribute, or dispense, is a felony. 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), & (b)(1)(B)(vii).

3. As the defendant property was used to commit a controlled substance violation in that it was used by LACRC to grow and distribute its marijuana, the substitute res representing the defendant property is subject to forfeiture to the government pursuant to 21 U.S.C. § 881(a)(7).

4. Section 981(a)(1)(A) of Title 18 provides for the forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957, or 1960 of this title, or any property traceable to

such property." 18 U.S.C. § 981(a)(1)(A). Section 1956(a)(1)(A)(i) prohibits the conducting of a financial transaction involving the proceeds of a specified unlawful activity "with the intent to promote the carrying on of specified unlawful activity . . . ." 18 U.S.C. § 1956(a)(1)(A)(i). Likewise, Section 1957(a) prohibits monetary transactions in criminally derived property of a value greater than $10,000 that is derived from specified unlawful activity. 18 U.S.C. § 1957(a). A controlled substance violation is a specified unlawful activity. 18 U.S.C. §§ 1956(c)(7)(A), 1961(1)(D) & 1957(f)(3).

5. As the defendant property was involved in a financial transaction (namely, its purchase by LACRC on October 6, 2000) involving the proceeds of a specified unlawful activity (namely, the $120,000 down payment derived from marijuana distribution) with the intent to promote the carrying on of the specified unlawful activity (namely, the cultivation and distribution of marijuana at the site), and the criminally derived property had a value greater than $10,000, the substitute res is traceable to property involved in a money laundering transaction in violation of 18 U.S.C. §§ 1956(a)(1)(A)(1) and 1957(a) and thus subject to forfeiture to the government pursuant to 18 U.S.C. § 981(a)(1)(A).

6. Section 981(a)(1)(C) of Title 18 provides for the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting a specified unlawful activity . . . or a conspiracy to commit such offense." 18 U.S.C. § 981(a)(1)(C). The term "proceeds" is defined, in cases involving illegal goods, illegal services, or unlawful activities, to mean "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized form the offense." 18 U.S.C. § 981 (a)(2)(A). As marijuana is a Schedule I controlled substance, illegal goods and services are involved

and "proceeds" thus means gross proceeds and is not limited to the net gain. Thus, the "proceeds" are gross proceeds and includes portions claimed by Wells Fargo and WHCDC.

7. The term "innocent owner" is defined to mean, with respect to property interests acquired before the illegal conduct, a person who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A).[1]

8. Under the first prong, the owner must prove that he or she did not know of the conduct giving rise to forfeiture; knowledge of the illegality of the conduct is not required. *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918, 924 (9th Cir. 1996) (rejecting notion that a claimant could prove that he was an innocent owner by showing that he was not aware of the illegality of the conduct and stating that an innocent owner "must lack knowledge of the transactions; it is not enough to demonstrate ignorance of the transactions' illegality"); *United States* v. *105,800 Shares of Common Stock of FirstRock Bancorp, Inc.*, 830 F. Supp. 1101, 1131 (N.D. Ill. 1993) (rejecting that claimant was an innocent owner because she was not aware of the illegality of her involvement); *United States* v. *316 Units of Municipal Securities in the Name of Efrain Gonzalez*, 725 F. Supp. 172, 180 (S.D.N.Y. 1989) (disagreeing with claimant that "innocent owner" refers to lack of knowledge of the transactions' illegality).

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[1] LACRC distributed marijuana both before and after it acquired the defendant property. With respect to property interests acquired after the conduct giving rise to forfeiture, "innocent owner" means a person who was a bona fide purchaser for value and did not know and was reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(3)(A). To the extent that this section may apply, neither claimant can meet it.

9. Here, the conduct in question is LACRC's cultivation and distribution of marijuana. As ample undisputed evidence in this case shows that both Wells Fargo and WHCDC were at all times aware of this conduct, claimants cannot show that they were unaware of the conduct giving rise to forfeiture.

10. Alternatively, claimants may seek to show that they are innocent owners by showing that, upon learning of the conduct giving rise to forfeiture, they did "all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A)(ii). "[W]ays in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person . . .

> (I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and
>
> (II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

18 U.S.C. § 983(d)(2)(B)(i).

11. The first example given in 18 U.S.C. § 983(d)(2)(B)(i)(I) is inapplicable here because LACRC's activities were widely known. Under the unique circumstances of this case, in which the illegal activity was widely known, merely notifying a law enforcement agency appears to be insufficient to discharge an owner's obligation to do "all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A)(ii). This is particularly so in the case of lenders who have within

their powers their own means to terminate the illegal usage of property to which they hold a security interest.

12. Neither Wells Fargo nor WHCDC made any attempts to give notice "to an appropriate law enforcement agency." Given that the DEA was charged with enforcement of federal drug laws and LASD was charged with enforcement of state drug laws, giving notice only to LASD is not sufficient notice to an "appropriate" law enforcement agency for purposes of enforcement of federal drug laws. Further, given that, even before the passage of Proposition 215, LASD acted to disregard Health and Safety Code provisions making the cultivation and distribution of marijuana illegal even under state law, it is unlikely that notification of LASD would do anything to terminate the illegal usage of the defendant property. Thus, neither claimant did all that reasonably be expected under the circumstances to terminate the illegal use of the property by giving timely notice to an appropriate law enforcement agency.

13. The second example given, which requires that the owner to show that it "revoked or made a good faith attempt to revoke permission for those engaging in such conduct to sue the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property," 18 U.S.C. § 983(d)(2)(B)(i)(II), is more apt here. Because both Wells Fargo and WHCDC held the power to revoke permission to use the property for illegal purposes (indeed, such a condition was expressly written into the deeds of trust), it is appropriate to require them to have acted in such a fashion in order to discharge their burden of doing "all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A)(ii). Neither Wells Fargo nor WHCDC made any effort to revoke permission to use the property in an illegal manner. Thus, neither claimant did all that it could reasonably do and is not an innocent owner.

14. Summary judgment is appropriate where the moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Where the nonmoving party has the burden of proof at trial, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986).

15. As there is no genuine issue of material fact, the government is entitled to judgment as a matter of law.

16. Any finding of fact which is deemed to be a conclusion of law is hereby incorporated herein.

Dated: April 5, 2004

/s/
MANUEL L. REAL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO. CV-02-4176-R,
[CONSOLIDATED ACTION]

UNITED STATES OF AMERICA,
Plaintiff,

v.

$55,908.58 IN FUNDS SEIZED FROM WELLS FARGO BANK ACCOUNT NOS. 037-2068957, 636-9732813, 624-6386437, 075-8539936, AND 075-8539928, IN THE NAME OF LOS ANGELES CANNABIS RESOURCE CENTER,
Defendant,

L.A. CANNABIS RESOURCE CENTER AND SCOTT IMLER,
Claimants.

NO. CV-02-4176-R (CTX)

UNITED STATES OF AMERICA,
Plaintiff,

v.

REAL PROPERTY LOCATED AT 7494 AND 7501 SANTA MONICA BOULEVARD, WEST HOLLYWOOD, CALIFORNIA,
Defendant,

L.A. CANNABIS RESOURCE CENTER, INC.; SCOTT IMLER; WELLS FARGO BANK, N.A.; AND WEST HOLLYWOOD COMMUNITY DEVELOPMENT COMMISSION,
Claimants.

NO. CV-02-4724-R (CTX)

UNITED STATES OF AMERICA,
Plaintiff

V.

REAL PROPERTY LOCATED AT 343 LOCKWOOD VALLEY ROAD, FRAZIER PARK, CALIFORNIA,
Defendant,

JUDY M. OSBURN AND LYNN W. OSBURN,
Claimants.

JUDGMENT

DATE: [APRIL 5, 2004]
TIME: 10:00 A.M.
COURT: HON. MANUEL L. REAL

The motion of plaintiff United States of America for summary judgment or, alternatively, for summary adjudication of issues came on regularly for hearing before the Court. Upon consideration of the motion, memoranda of points and authorities, declarations, and exhibits filed by the parties; arguments of counsel in connection with the motion; and pleadings and other papers on file herein,

IT IS ADJUDGED, ORDERED, AND DECREED that plaintiff's motion for summary judgment be and hereby is GRANTED. All right, title, and interest in the defendant property is forfeited to plaintiff United States of America for disposition in accordance with law.

Dated: April 5, 2004

/s/
MANUEL L. REAL
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

WEST HOLLYWOOD COMMUNITY
REDEVELOPMENT COMMISSION,
Claimant - Appellant,

v.

7494 AND 7501 SANTA MONICA BOULEVARD,
WEST HOLLYWOOD, CALIFORNIA,
REAL PROPERTY LOCATED AT,
Defendant.

No. 04-56043,
D.C. No. CV-02-04176-R

ORDER

April 27, 2006

Before: **KOZINSKI, TROTT** and **BEA**, Circuit Judges.

The petition for rehearing and rehearing en banc is **DENIED**. *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

APPENDIX E

RELEVANT STATUTORY PROVISIONS

The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. No. 106-185, 114 Stat. 202, codified as amended, 18 U.S.C. § 983, provides in relevant part:

§ 983. General rules for civil forfeiture proceedings

(a) Notice; claim; complaint.—

(1)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

> **(I)** send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or
>
> **(II)** terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90

days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of

Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall—

(i) identify the specific property being claimed;

(ii) state the claimant's interest in such property; and

(iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not—

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired—

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time

the complaint was filed to establish the forfeitability of the property.

(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation.—

(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as—

(i) the person's standing to contest the forfeiture; and

(ii) whether the claim appears to be made in good faith.

(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain repre-

sentation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B)(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) Burden of proof.—In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent owner defense.—

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property—

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order—

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

(6) In this subsection, the term "owner"—

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include—

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion to set aside forfeiture.—

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if—

(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced—

(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release of seized property.—

(1) A claimant under subsection (a) is entitled to immediate release of seized property if—

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth—

(i) the basis on which the requirements of paragraph (1) are met; and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If—

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)—

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including—

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property—

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) Proportionality.—

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil fine.—

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than $250 or greater than $5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil forfeiture statute defined.—In this section, the term "civil forfeiture statute"—

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include—

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) Restraining orders; protective orders.—

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, ac-

countants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture—

(A upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party

against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.